

No. 47217-1-II

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**CITY OF TACOMA,
Respondent**

v.

**JASON DEAN SMITH,
Appellant.**

**ON PETITION FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
The Honorable Thomas Larkin
No. 14-1-03631-2**

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The superior court did not err in finding the sentencing court's refusal to impose sanctions did not violate Mr. Smith's right to a speedy sentence.
2. The superior court did not err by finding that the sentencing court did not abuse its discretion in ordering an alcohol drug evaluation.
3. The superior court did not err by finding that the sentencing court did not violate Mr. Smith's due process rights when it set a review hearing while Mr. Smith was at the Department of Corrections.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does speedy sentencing apply to probation violations?
2. May a sentencing court delay sentencing for the purpose of monitoring a pending charge?
3. Did the sentencing court's decision to set over and monitor a pending charge violate Mr. Smith's speedy sentencing?
4. Did the sentencing court have authority to order an alcohol drug evaluation?
5. Did the sentencing court violate Mr. Smith's due process rights in setting a review while he was at the Department of Corrections?

III. STATEMENT OF THE CASE AND PROCEDURAL HISTORY.

On February 13th, 2012, the City of Tacoma charged Mr. Jason Smith, with one count of a violation of a no contact order.

On March 5th, 2012, Mr. Smith was found guilty and sentenced to 364 days with 341 days suspended for a period of five years on conditions including; fines of 300 dollars, abiding by any/all no contact or protection orders, law abiding behavior and no similar incidents. (CP 4-5). On April 23rd, 2013, Mr. Smith missed a show cause hearing the court issued as a result of pending Superior Court matters. These Superior Court matters included three counts of controlled substance and one count of firearm possession. (CP 7).

On August 16th, 2013, the court noted Mr. Smith's pending felony matter, 13-1-02843-5 as well as 13U000012 stemming out of Lakewood. The court noted these pending violations and reset a violation hearing to September 17th, 2013. The defense did not raise an objection to the set over. (CP 7).

On September 17th, 2013, the court noted Mr. Smith had been found guilty on 2Z0286839 (Disorderly conduct and False Statement), and also found guilty on 13U000012 (Violation of Protection Order and Telephone Harassment). The court noted the felony matters were still

pending. It was the defense request to set the violation hearing over once more. (CP 7).

On October 24th, 2013, the defense filed a motion to sanction Mr. Smith, despite the earlier request to set the violation hearing until November. At the motion hearing, the defense requested the court to accept Mr. Smith's written stipulation to the admissibility of the probable cause declaration regarding the pending Superior Court matters and further requested the court to sanction Mr. Smith. The court granted the motion with regards to admissibility of the probable cause statement, however denied the request to sanction Mr. Smith. (CP 36-37).

At Mr. Smith's violation hearing on November 7th, 2013, the felony matters were still pending. The defense requested the court sanction Mr. Smith and in an attempt for the Superior Courts to be aware of any sanction done in Municipal Court, suggested filing of a declaration. Without citing to any case law or legal authority and based on pure speculation, defense argued the trial court abused its discretion. The defense acknowledged that Mr. Smith was held by Superior Court and that those matters were continued a number of times, and because such continuances were at Mr. Smith's request, there was no prejudice. (CP 45-47).

Mr. Smith appealed the court's ruling. On April 25th, 2014, the Superior Court heard arguments and found that the court did not violate Mr. Smith's right to a speedy sentence.

On August 22nd, 2014 Mr. Smith filed a motion and requested that sanctions be imposed. The court took the motion under advisement and denied the motion on the basis that the court was waiting to determine if the Superior Court was ordering any conditions to include an alcohol drug assessment. (CP 12).

Mr. Smith was subsequently sentenced to 60 months on his Superior Court matter. (CP 12-13). On September 15, 2014, the trial court sentenced Mr. Smith to 90 days consecutive to his Superior Court matter and also ordered an alcohol drug assessment. The court ordered a review hearing for this condition on December 12th, 2014.

On appeal, Mr. Smith argued that 1) his speedy sentence had been denied, 2) the trial court had not authority to order an alcohol/drug evaluation as a condition, and 3) his due process was denied when the court set a review hearing knowing he would be at the Department of Corrections

On January 16th, 2014, the Pierce County Superior Court affirmed Mr. Smith's sentence finding that 1) Mr. Smith's right to a speedy sentence was not violated; 2) the trial court did not abuse its discretion by

ordering an alcohol/drug evaluation and 3) Mr. Smith's due process rights were not violated by setting a review hearing when Mr. Smith will be at DOC and unable to attend (CP 55-56)

On February 13th, 2015, Mr. Smith filed a Notice of Intent to Seek Discretionary Review. This Court granted review on May 7th 2015. This case is before this Court on appeal. (CP 57-60).

IV. ARGUMENT

1. Speedy Sentencing Does Not Apply to Sentencing Following a Probation Revocation.

Mr. Smith's right to a speedy sentence was not violated because speedy sentencing is not applicable to probation violations. Revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations., *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed 2d 484 (1972), *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336, 1967 U.S.

Additionally under the language of the statute, it is clear that speedy sentencing is applicable in domestic violence cases after imposition of an original sentence, not following a probation violation as Mr. Smith contends.

After a conviction, the court may impose sentence by suspending all or a portion of the defendant's sentence or by deferring the sentence of the defendant and may place the defendant on probation ...

RCW 3.66.067.

For a period not to exceed five years after imposition of sentence for a defendant sentenced for a domestic violence offense . . . , the court has continuing jurisdiction and authority to suspend or defer the execution of all or any part of its sentence...

RCW 3.66.068 (emphasis added).

Deferral of sentence and suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension. Upon the revocation of the deferral or suspension, the court may impose the sentence previously suspended or any unexecuted portion thereof. In no case shall the court impose a sentence greater than the original sentence, with credit given for time served and money paid on fine and costs.

RCW 3.66.069.

For all of the above reasons, the court should find that speedy sentencing does not apply to a probation violation.

2. The Sentencing Court Did Not Violate Mr. Smith's right to a Speedy Sentence as the Sentencing Court Had Authority to Monitor Probation and Order Sanctions as it Deemed Appropriate.

The legal authority in which defense cited to all dealt with the delay of the original sentence and not the imposition of sanctions for probation violations after a formal sentence have been pronounced.

Pollard v. United States, 352 U.S. 354, 361, 1 L.Ed. 2d 393, 77 S. Ct. 481

(1957) was a case where the petitioner pleaded guilty to the unlawful taking and embezzlement of a United States Treasury check where no sentence was imposed prior to the trial judge entering a judgment that placed the petitioner on probation. *State v. Johnson*, 100 Wn.2d 607, 629, 674 P.2d 145 (1983) was a case where the defendant was sentenced 13 months after his conviction. *State v. Edwards*, 93 Wn.2d 162, 163-6, 606 P.2d 1224 (1980) was a case where defendant was never sentenced before the court committed him to a sexual psychopathy program. *State v. Ellis*, 76 Wn.App. 391, 394, 884 P.2d 1360 (1994) was a case where the defendant was found guilty of delivery of a controlled substance but sentencing had been delayed for almost two years through no fault of his own.

RCW 3.66.068 reads in part:

“For a period not to exceed five years after imposition of sentence for a defendant sentenced for a domestic violence offense or under RCW 46.61.5055 and two years after imposition of sentence for all other offenses, the court has continuing jurisdiction and authority to suspend or defer the execution of all or any part of its sentence upon stated terms, including installment payment of fines. ..

(3) A defendant who has been sentenced, or whose sentence has been deferred, and who then fails to appear for any hearing to address the defendant’s compliance with the terms of probation when ordered to do so by the court, shall have the term of probation tolled until such time as the defendant makes his or her presence known to the court on the record.” Citing to RCW 3.66.068.

This statute clearly allows a court of limited jurisdiction to impose probationary terms as a condition for suspending a sentence. The statutory phrase “upon stated terms’ is broad enough to encompass future law abiding behavior matters.

Probation outside the Sentencing Reform Act (SRA) is not a matter of right but a matter of grace, privilege, or clemency “granted to the deserving, and withheld from the undeserving, as sound official discretion may dictate.” See *State v. Farmer*, 39 Wash.2d 675, 679, 237 P.2d 734 (1951). A court may impose probationary conditions that bear a reasonable relation to the defendant’s duty to make restitution or that tend to prevent the future commission of crimes. *State v. Summers*, 60 Wash.2d 702, 707, 375 P.2d 143 (1962). The Washington State Supreme Court in the *Summers* case noted “appellate courts are reluctant to interfere with the discretion exercised by the trial court in imposing conditions on a suspension of a sentence, and shall uphold any such conditions which on any reasonable theory tend to cause a defendant to make reparation for any crime which he may have committed, or to restrain him or others from the commission in the future of other crimes.”

In this case, to suggest the trial court’s refusal to sentence Mr. Smith was purposeful or manipulative is improper. While Mr. Smith’s brief has cited to several cases where the trial court was reversed, it has no

bearing as to the underlying procedural posture of Mr. Smith's case, nor is it controlling case law. Petitioner's brief failed to mention the standard practice of requesting the trial court to set the violation hearing over after the defendants have new criminal charges, which the trial court would grant, to monitor the outcome of these new matters before determining what sanctions, if any, would be appropriate. The request to set over these hearings is reasonable because while the standard of proof is different in a probation violation as opposed to a trial, where the defendant ultimately is presumed to be innocent of any criminal charges. Therefore, it would stand to reason to await the outcome of a pending criminal matter. Mr. Smith may be found guilty, but he also may be acquitted at which point Mr. Smith may not be facing any sanctions.

In this case, Mr. Smith could not comply with the condition of his sentence of having law abiding behavior. Three felony charges as well as seven additional gross misdemeanor charges were of record after Mr. Smith took a plea on this case. Although not all matters rendered to a guilty finding, the simple fact Mr. Smith was charged with new matters caused the court concern. Especially concerning were the new domestic violence charges involving no contact order violations and telephone harassment.

Thus, the Superior Court did not err when it concluded the sentencing court did not violate Mr. Smith's right to a speedy sentence as the sentencing court has discretion to monitor the outcome of pending charges and sanction Mr. Smith accordingly to prevent the future commission of crimes. Additionally, the sentencing court had the authority to run a sentence consecutive to the Superior Court matter.

3. The Sentencing Court Did Not Abuse Its Discretion When It Ordered Mr. Smith to Obtain an Alcohol Drug Assessment.

A district court has almost unfettered discretion to impose conditions on a defendant's probation. *See, e.g., State v. Williams*, 97 Wn. App. 257, 262–63, 983 P.2d 687 (1999). Under RCW 3.66.068, the court may suspend or defer any part of its sentence:

For a period not to exceed five years after imposition of sentence for a defendant sentenced for a domestic violence offense . . . and two years after imposition of sentence for all other offenses, *the court has continuing jurisdiction and authority to suspend or defer the execution of all or any part of its sentence* upon stated terms, including installment payment of fines.

Unlike the Sentencing Reform Act (SRA), which narrowly limits the Superior Court to imposing only those conditions that are directly related to the crime, district courts are not so restricted. Instead, a district court may impose any condition so long as the condition “bears[s] a reasonable relation to the defendant's duty to make restitution or that [it]

tend to prevent the *future commission of crimes.*” *Williams*, 97 Wn. App. at 263 (citing *State v. Summers*, 60 Wn.2d 702, 707, 375 P.2d 143 (1962)) (emphasis added). Besides the statutory maximum punishments for misdemeanors and gross misdemeanors, a district court is left almost entirely to its own discretion in determining the conditions of any particular sentence. RCW 3.66.

Here, the sentencing court properly exercised its discretion to impose an alcohol drug assessment that mirrored the conditions of what the Superior Court ordered in Mr. Smith’s felony matters. The sentencing court determined that an alcohol drug assessment was necessary to prevent the future commission of crimes. It should be pointed out that Mr. Smith had new alcohol/drug related felony matters that were pending during the sentencing court’s jurisdiction on this case. In addition, the sentencing court’s discretion in ordering an alcohol drug assessment was in lieu of a further sanction. The sentencing court was entirely within its discretion when it determined that such conditions were necessary.

Mr. Smith fails to demonstrate that the sentencing court abused its discretion. Mr. Smith fails to identify any statute that the court violated when it imposed its sentence, or some other statutory authority that would otherwise limit the discretion of the court during sentencing. Mr. Smith also fails to reference any case authority that might demonstrate it is

improper to require a defendant to participate in alcohol treatment as part of his probation. Thus, the sentencing court used its discretion to order an alcohol drug evaluation and Mr. Smith's sentence should not be reversed and remanded on the basis of striking this condition.

4. Mr. Smith Was Not Denied Due Process When the Sentencing Court Set a Review While Mr. Smith Was at the Department of Corrections.

Mr. Smith relies on *State v. Chavez-Romero*, 176 Wash.2d 1023, 299 P.3d 1171 (2013), which interprets the application of speedy trial rule pertaining to pre-disposition cases and trial settings. The court in *Chavez-Romero* court "determined that the " failure to appear" provision " is intended to apply to a defendant who thwarts the government's attempt to provide a trial within the time limits." Id. at 739, 158 P.3d 1169, " CrRLJ 3.3(c)(2)(ii) was not intended to apply when the State elects not to transport a defendant to a proceeding." *State v. George*, 160 Wn.2d 727, 736-37, 158 P.3d 1169 (2007).

Unlike *Chavez-Romero*, in our case, the sentencing court was dealing with a post disposition case where it executed the jail sentence and set a review hearing on December 12th, 2014. The sentencing court did not violate Mr. Smith's due process when it set a hearing on December 12, 2014 for the purpose of reviewing the court's condition of an alcohol drug assessment. In *Chavez-Romero*, the court did find that the defendant's

absence due to his federal detention did not justify the trial court's decision to reset the trial date under CrR 3.3(c)(2)(ii). Mr. Chavez-Romero did not willfully fail to appear. Instead, CrR 3.3(e)(6) excludes this period of detention from the time for trial calculation. *Id.* The trial court should not have reset Mr. Chavez-Romero's trial date. However, the court also stated “CrR 3.3 did not impose a duty of due diligence on the State to bring Mr Chavez-Romero to his April 28 pretrial hearing.” *Id.*

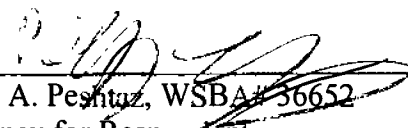
In this case, the issue was not resetting Mr. Smith's trial date or calculating speedy trial time; rather the issue was scheduling a review hearing after the court had already sentenced Mr. Smith. The sentencing court in this matter had probation over Mr. Smith for a period of five years and has no control of when the Department of Corrections releases a defendant or if any work release privileges will be revoked if a warrant is outstanding. Thus, it was within the sentencing court's discretion to set a review hearing for the purpose of monitoring Mr. Smith's conditions and setting such a review did not deny Mr. Smith of his due process.

Additionally, the sentencing court cannot prematurely calculate Mr. Smith's release given that the jails supersede the court in determining any good time credit that may be applicable.

V. CONCLUSION

In conclusion, the sentencing court did not violate Mr. Smith's right to a speedy sentence as it is not applicable to probation violations and had the authority to monitor probation and impose sanctions as deemed appropriate. Additionally, the sentencing court did not abuse its discretion when it ordered an alcohol drug evaluation to deter the future commission of crimes. Finally, the sentencing court did not deny Mr. Smith's due process rights in setting a review while Mr. Smith was at the Department of Corrections. For all these reasons, this Court should deny the Appellants motion to reverse the sentence and remand this case to the sentencing court.

Respectfully submitted this 19th day of August, 2015.

/s/ 
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Attorney for Respondent

TACOMA MUNICIPAL COURT

August 20, 2015 - 9:19 AM

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